HENRY Y. YOSHINO

IBLA 87-27 Decided March 21, 1989

Appeal from a notice of termination for oil and gas lease CA 6223 issued by the California State Office, Bureau of Land Management.

Affirmed.

1. Oil and Gas Leases: Assignments or Transfers--Oil and Gas Leases: Rentals--Oil and Gas Leases: Termination

A rental payment for an oil and gas lease sent to the wrong office does not constitute proper tender of rental. BLM is required to terminate an oil and gas lease for failure to pay rental timely and properly looks to the lessee of record for such payment. The assignee of an oil and gas lease, however, may tender payment while approval of the assignment is pending.

APPEARANCES: Henry Y. Yoshino, pro se.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Henry Y. Yoshino has appealed from a September 5, 1986, notice of the California State Office, Bureau of Land Management (BLM), informing him that oil and gas lease CA 6223 had terminated for failure to pay rental in a timely manner.

The record shows that BLM originally issued noncompetitive oil and gas lease CA 6223, effective July 1, 1979, for 360 acres of public lands to Yoshino. After assigning half his title interest in 1979, which was reassigned to him in 1980, Yoshino assigned all his interest in the lease to Atlantic Richfield Company in 1981. Pursuant to a request for assignment filed June 9, 1986, BLM approved reassignment of the lease from Atlantic Richfield Company back to Yoshino effective July 1, 1986. Along with the required $25 filing fee (for processing the application for assignment), an additional $360 for rental payment was included in a check tendered by Yoshino with the June 1986 assignment application. The check was accepted

by BLM for the filing fee and the remainder was applied to an unearned account for return to Yoshino. 1/

On September 5, 1986, BLM issued a notice of termination because the record showed that a rental payment for the lease had not been received by the Minerals Management Service (MMS) in Denver, Colorado, on or before the July 1, 1986, anniversary date. In response to this notice, Yoshino submitted a copy of the termination notice, a copy of his cancelled check for $385 made payable to BLM, and a copy of the assignment form. BLM treated his submission as a petition for reinstatement of the lease under 30 U.S.C. § 188(c) (1982) (class I reinstatement) and denied reinstatement. On September 26, 1986, appellant filed an appeal stating that his challenge to BLM's decision "is not a matter of Class I or Class II Petition or [sic] Reinstatement," but is an appeal of the notice of termination.

Appellant argues that he could not pay the rental because, prior to reassignment, which was not effective until July 1, 1986, the anniversary date of the lease, the lease "was in the hand of Atlantic Richfield." He also asserts that "[t]he reassignment form stated clearly that I had to file in the proper [BLM] office where the lease existed," and questions whether he could properly separate "the filing and rental due." Appellant contends that he followed the instructions provided him "on the reverse side of the assignment form."

Section 31(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 188(b) (1982), and 43 CFR 3108.2-1(a) provide that upon the failure of a lessee to pay rental on or before the anniversary date of a lease on which there is no well capable of production of oil or gas in paying quantities, the lease terminates automatically by operation of law. The Department takes no action to cause such termination; it is triggered solely by the failure of the lessee to pay rental timely. See Oil Resources, Inc., 28 IBLA 394, 405, 84 I.D. 91, 97 (1977).

[1] The primary issue presented by this appeal is whether appellant's payment to BLM constitutes a proper tender of the rental payment in advance of the lease's anniversary date. Contrary to appellant's assertion, the assignment form signed by him on June 6, 1986, does not instruct the assignee with respect to lease rental payments except for the provision where the assignee agrees he will be bound by the terms and conditions of the lease including "the obligation to pay all rentals" and the statement that "[the assignment] does not change the terms and conditions of the lease or the lease anniversary date of the lease for purposes of payment of annual

1/ The check for $385 accompanied the application for assignment filed with BLM. There is no declaration by Yoshino that the amount submitted was intended as a rental payment in addition to the required filing fee except for a handwritten note on the check, "rental, F.F." An application for assignment is unacceptable without the mandatory $ 25 filing fee. Thus, it seems clear that the check was accepted by BLM in order to process the assignment application.

rental." The original lease form for CA 6223 provides that rental shall be paid according to the lease except as "directed by the Secretary." Departmental regulation, 43 CFR 3103.1-2(2), provides that "[a]ll second-year and subsequent rentals shall be paid to the Service," meaning the MMS. Thus, rental for this lease was due at MMS, not BLM, on or before the July 1, 1986, anniversary date. A rental payment received in the wrong office will not constitute a proper tender of rental. Gulf Oil Corp., 69 IBLA 263, 268 (1982); Gretchen Capital, Ltd., 37 IBLA 392, 393-94 (1978). Here, BLM held, correctly, that appellant's remittance did not constitute proper tender of rental because it was not received in the proper office. E.g., Estate of Arlyne Lansdale, 83 IBLA 190 (1984). Thus, oil and gas lease CA 6223 terminated when rental was not timely received by MMS. 2/

Appellant's assertion that he could not submit rental for the lease because it was "in the hand of" the assignor is of no avail. In this instance, the assignment was approved effective on the anniversary date of the lease. Thus, appellant was the lessee of record and responsible for payment of rental on the date it was due. As all parties are on notice of the consequences of failure to pay annual rental in a timely manner, an assignee should make arrangements with the assignor to ensure timely payment of the rental pending notification of the approval of the assignment. The Board cannot waive nonpayment in this case by virtue of appellant's purported reliance upon the assignor because, once assignment of a lease has been approved, the assignee is responsible for making the rental payment timely. E.g., Monica V. Rowland, 90 IBLA 349 (1986). Assuming arguendo that the assignment to appellant had not been approved as of the anniversary date of the lease, there is nothing which precludes MMS' acceptance of lease rental from an unapproved assignee of an oil and gas lease.

The dissent places great reliance on the decision of the United States District Court for Colorado in Monsanto Co. v. James Watt, Civ. No. 81-A-272 (Jan. 5, 1982), and the decision of this Board in Richard L. Rosenthal, 45 IBLA 146 (1980). Leaving aside the substantial questions as to the

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2/ As noted, Yoshino appeals the termination of his lease. In cases such as Gulf Oil Corp., supra, the Board has reviewed individual petitions for reinstatement of terminated leases and whether a misdirected payment would preclude a determination that the lessee had exercised reasonable diligence. In Richard L. Rosenthal, 45 IBLA 146 (1980), a case involving denial of a petition for reinstatement of a terminated oil and gas lease, the Board found that BLM's negligence in reacting to a misdirected payment was a casual factor in the lessee's failure to timely submit a rental payment to the proper office and held that the lease should be reinstated. However, here, as (1) appellant did not petition for reinstatement of the subject lease and, (2) unlike Rosenthal, rental was not received in the proper office within 20 days of the rental due date (see 30 U.S.C. § 188(c) (1982)), whether or not BLM was negligent in failing to return his rental payment with reasonable dispatch is not an issue. Termination of a lease for failure to pay rental timely is automatic by operation of statute and mitigating circumstances cannot be considered.

correctness of the Monsanto decision, 3/ it is sufficient for our purposes that, even assuming that the Monsanto appeal was correctly decided by the District Court, that decision as well as the Board's decision in Rosenthal, undermines rather than supports the dissent's argument.

In both Monsanto and Rosenthal, reinstatement of the lease was ordered on the basis that the lessee had shown either reasonable diligence (Monsanto) or that the failure to exercise reasonable diligence was, under the facts of the case, justifiable (Rosenthal). But, what the dissent fails to come to grips with is the fact that, in both cases, the leases terminated when the payment was not timely received in the proper office and, in both cases, payment was ultimately received in the proper office within 20 days of the due date. This latter fact is of critical importance since, under the provisions of the law which were in effect at that time, no reinstatement of a lease was possible, regardless of how clearly it could be shown that reasonable diligence had been exercised or how demonstrable it was that justifiable reasons existed for the failure to exercise reasonable diligence unless payment was paid or tendered 4/ within 20 days of the anniversary date of the lease. See 30 U.S.C. § 188(c) (1982). This is the same standard which now guides reinstatement under class I and it is the inability of appellant to show receipt in the proper office within 20 days which prohibits the reinstatement of his lease under class I.

In other words, recognition that employees of BLM may have been less than diligent in returning the payment to appellant cannot alter the fact that payment was not received by MMS within 20 days of the anniversary date of the lease. Where the annual rental payment is not received within 20 days, the Department simply lacks authority to reinstate a terminated lease under Class I, no matter how compelling the facts of an individual case may be. See, e.g., Luceal Robert, 90 IBLA 182 (1986); Shell Oil Co., 57 IBLA 63 (1981); Susan Krammes Sammis, 37 IBLA 269 (1978). Indeed, it was

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3/ It is certainly open to some question whether the Court's decision in Monsanto correctly interprets either the reasonable diligence or the justifiable standard, particularly in light of the decisions of the Ninth and Tenth Circuit Courts of Appeal in Ram Petroleum, Inc. v. Andrus, 658 F.2d 1349 (1981), and Ramco, Inc. v. Andrus, 649 F.2d 814 (1981), respectively. Moreover, a substantial element in the court's decision was the BLM practice of forwarding the payment to the proper office. Since that decision, BLM has expressly altered this practice and the applicable regulation now provides that "[p]ayments made to an improper BLM office or the designated Service office shall be returned and shall not be forwarded to the proper BLM office or the designated Service office." 43 CFR 3103.2-2. Thus, the precedential value of this unpublished decision is certainly speculative. In any event, as pointed out in the text, the rationale implicit in the court's decision actually militates against reinstatement of the instant lease.

4/ In Mobil Oil Corp., 35 IBLA 265 (1978), the Board noted that "unless the proper BLM officer has the opportunity to receive or decline the proffered payment, no tender can be said to have occurred." Id. at 269.

the inability of the Department to afford relief in such circumstances which led Congress to amend 30 U.S.C. § 188 (1982), in order to provide for reinstatement under the provisions of class II. Thus, the decision of the State Office was correct in advising appellant that, while class I reinstatement was not available, he could, if he so desired, petition for a class II reinstatement.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Wm. Philip Horton
Chief Administrative Judge

I concur:

James L. Burski
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

The California State Office, Bureau of Land Management (BLM), issued oil and gas lease CA 6223 to Henry Yoshino for 360 acres in T. 32 S., R. 19 E., San Luis Obispo County, California, effective July 1, 1979.

The lease was assigned back and forth several times, the last time being from Atlantic Richfield Company to Yoshino in 1986. On June 6, 1986, Yoshino sent BLM the assignment form and a check for $ 385, marked "rental, F.F.," i.e., $360 for annual rental and $ 25 for the fee for filing the assignment.

BLM received the assignment form and the check on June 9, 1986. It deposited the check on that date, approved the assignment on June 13, and sent Yoshino the assignment form and Receipt and Accounting Advice No. 1336616. The receipt reads:

> Assignment for Oil and Gas, TMH/CA 6-9-86 0 22 1 25
> 6-9-86 0 22 7 360

thus apparently crediting him for the payment of annual rental as well as the filing fee.

On September 5, 1986, BLM issued a decision informing Yoshino that his lease had expired on July 1 for failure to pay rental and that he could petition for reinstatement. The decision set forth the conditions for class I and class II reinstatement under 30 U.S.C. § 188(c) and § 188(d) and (e) (1982), respectively. Yoshino responded by sending BLM copies of the decision, his June 6 check, the receipt, and the assignment form.

BLM then issued a decision dated September 22, 1986. The decision stated in part:

> Yoshino should have paid the rental to Minerals Management Service 1/ [MMS] as required by regulation 43 CFR 3103.1-2(a)(2), and this office should not have accepted his check and should have returned it to him pursuant to regulation 43 CFR 3103.2-2. However, this office cashed the check and applied $25.00 to the assignment filing fee and $360.00 to the unearned account. The assignment was subsequently approved, but the $360.00 in the unearned account went unnoticed by this office. Hence, no notice was sent to Yoshino informing him he had paid the rental to the wrong office.
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> If the items submitted [by Yoshino in response to the September 5 decision] are to show that the rental was timely paid, that cannot be accepted because the payment was not made to Minerals Management Service, the office where payment is required to be paid. It is regretable [sic] that this office did not inform Yoshino that he had paid the wrong office. However, that failure does not remedy the termination of lease CA 6223 for

failure to pay the rental to Minerals Management Service in a timely manner.

1/ Minerals Management Service - BRASS, P. O. Box 5640 T,A. Denver, Colorado 80217

BLM's decision went on to say that if Yoshino's response was intended to petition for class I reinstatement it was denied (because the rental was not paid to MMS within 20 days of July 1 and because no $ 25 fee for reinstatement was enclosed, a deficiency BLM noted was curable) but that there was still time to petition for class II reinstatement. 1/ It also pointed out that he had a right of appeal to the Board that could be pursued at the same time. The decision stated that Yoshino's $ 360 was being retained "in the event an appeal is filed maintaining that the rental was properly paid or that a class I reinstatement should be granted."

Yoshino wrote BLM a letter on September 25 saying he had followed the instructions on the assignment from that the form was to be sent to the BLM office where the lease existed and asking how he could have separated the filing fee and the rental due and sent them to two different offices. "I hope that this matter can be properly judicated [sic], all I am asking is fair play," he concluded. BLM treated the letter as a notice of appeal and forwarded the file to the Board.

30 U.S.C. § 188(b) (1982) provides that "upon failure of a lessee to pay rental on or before the anniversary date of the lease * * * the lease shall automatically terminate by operation of law." 30 U.S.C. § 188(c) (1982) provides that

> [w]here any lease * * * is hereafter terminated by operation of law under this section for failure to pay on or before the anniversary date the full amount of rental due, but such rental was paid on or tendered within twenty days thereafter, and it is shown to the satisfaction of the Secretary of the Interior that such failure was either justifiable or not due to lack of reasonable diligence on the part of the lessee, the Secretary may reinstate the lease.

It is clear Yoshino did not fail to pay the rental before the anniversary date. Because BLM did not follow the regulation stating that payments made to an improper BLM office "shall be returned," but rather kept his money and sent him a receipt that appeared to credit him for the rental payment, the lease should not be regarded as having terminated by operation of law.

1/ BLM's Sept. 5, 1986, decision stated that, to qualify for class II reinstatement, appellant would have to submit a petition along with the required fees within 60 days of receipt. See 30 U.S.C. § 188(d)(2)(B)(i) (1982).

The majority, however, treat the lease as having terminated on the grounds that "a rental payment received in the wrong office will not constitute a proper tender of rental," citing Gulf Oil Corp., 69 IBLA 263, 268 (1982). What the decision in Gulf Oil Corp. actually says, however, is that "mailing the check to the wrong office ordinarily precludes a finding of reasonable diligence" that would authorize reinstatement of a lease. The decision then notes:

> However, in Monsanto Co. v. Watt, No. 81-272 (D. Colo. Jan 5, 1982), rev'g Monsanto Co., 51 IBLA 271 (1980), the court found that Monsanto had been reasonably diligent and that late payment had been justified even though it had sent a rental payment to the wrong BLM office, and the court ordered reinstatement of the lease.

69 IBLA at 268.

In Monsanto Co., the company mistakenly sent a check for its annual rental to the Wyoming State Office, where it was received on January 29, when the office opened after having been closed several days due to a blizzard. The rental was actually due at the Colorado State Office on February 1. The Wyoming State Office forwarded the check on February 1 to the Colorado State Office, where it arrived February 4. The Colorado State Office notified the company that its lease had terminated and denied its petition for reinstatement on the grounds that "[m]ailing a payment to the wrong office does not constitute reasonable diligence and cannot be considered justifiable." 51 IBLA at 272.

The Board affirmed, holding that the company had not shown either that its late payment was not due to a lack of reasonable diligence or that it was justifiable:

> Because, under regulation, a check does not constitute payment unless it is received at the proper office, it necessarily follows that the requirement of "sending or delivering payment" cannot be met by sending the check to the wrong office. Thus, mailing the check to the wrong office * * * logically and legally precludes a finding of reasonable diligence. Gretchen Capital, Ltd., 37 IBLA 392 (1978).
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> The Department has consistently held that a late payment of rental is justifiable within the meaning of the statute only where the failure to make timely payment is the result of causes beyond the control of the lessee and simple inadvertence has never been held by this Board to justify late payment. See [id.] * * * Appellant admits that the check was sent to the wrong office out of simple inadvertence[.]

51 IBLA at 273-74.

On appeal, the Board's decision was held unlawful and set aside, and the company's lease was ordered reinstated. Monsanto Co. v. Watt, Civil

Action 81-A-272 (D. Colo., Jan. 5, 1982). The court noted that the stated purpose of the 1970 amendment to the Mineral Leasing Act that provided the present language concerning reinstatement in section 188(c) was to "enable the Secretary to do equity" 2/ (Memorandum Opinion at 4). The court also observed that the legislative history indicated that the provision was intended "to cover the specific situation when the 'rental payment was mailed in ample time but the letter was misdirected to the wrong office.'" 3/ Id. at 10 n.8. The court found that the company's misdirection of the payment and the blizzard were together responsible for the untimely payment. It found the Board's conclusion that the late payment was due to a lack of reasonable diligence was

> arbitrary and capricious and not in accordance with the law in two respects under the reasonable diligence standard. First, the mere fact that payment is mailed to the wrong office does not prevent a finding of reasonable diligence as defined by 43 CFR 3108.2-1(c)(2). [4/] Second, the effect of the blizzard must be considered and it, under the regulation, is not a normal delay in the collection, transmittal or delivery of the payment.

Id. at 6-7. The court found that mailing the payment 8 days in advance of the due date was "sufficiently in advance of the due date to account for the normal delays."

The court found the Board's conclusion that the untimely payment was not justifiable was arbitrary because it focussed "solely [on] employee negligence or inadvertence" and overlooked "the effect on delay due to the equally substantial cause of the blizzard", which was "clearly a factor outside the lessee's control." Id. at 9, 10.

The court also determined that the decisions in Ram Petroleums, Inc. v. Andrus, 658 F.2d 1349 (9th Cir. 1981), and Ramoco, Inc. v. Andrus, 649 F.2d 814 (10th Cir. 1981), were inapplicable because in those cases the delay in payment was due solely to the negligence of a lessee's employee. The court concluded:

> In addition, the legal aspects of Ram Petroleums and Ramoco differ when compared to this case. Each case held that the standards defining reasonable diligence and justifiable, as interpreted by the Secretary, were in accordance with the congressional intent of 30 U.S.C. 188(c) and should be given considerable deference. No similar legal attack on these standards has been made in this case. Instead the issue here is given these standards as defined

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2/ H.R. Rep. No. 1005, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Admin. News at 3002.

3/ 116 Cong. Rec. 12413 (1970).

4/ 43 CFR 3108.2-1(c)(2) (1982) provided: "Reasonable diligence normally requires sending or delivering payments sufficiently in advance of the due date to account for the normal delays in the collection, transmittal, and delivery of payment."

> by the Secretary, were they applied in a manner that was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law to the facts involved in this situation. I find that the reasonable diligence and justifiable were applied arbitrarily in this case and that this application was not in accordance with 30 U.S.C. 188(c), 43 C.F.R. 3108.2-1(c)(2), and previous IBLA decisions.

Id. at 11.

The "previous IBLA decisions" that the court relied on in part were two cases in which the "general situation * * * is directly applicable to the facts involved in the instant case," id. at 9, but which, the court observed, the Board's decision in Monsanto Co. "curiously dismissed * * * as inappropriate precedent for this case." Id. at 8. In Richard L. Rosenthal, 45 IBLA 146 (1980), the lessee's check for the annual rental was sent to the wrong state office, where it arrived 2 weeks before the lease anniversary date. That office did not forward the check to the proper office until that date. The check arrived in the proper office after the anniversary date, so that office notified the lessee the lease had terminated. The lessee petitioned for reinstatement and the petition was denied. Distinguishing Gretchen Capital, Ltd., 37 IBLA 392 (1978), a case in which the lessee's check arrived in the wrong office 8 days before the anniversary date and was duly forwarded by BLM arrived too late, the Board stated:

> The present appeal, however, discloses a situation in which the initial delay attributable to the appellant's error was compounded by the excessive length of time it took employees of the Colorado State Office either to return the payment to appellant or to forward it to the proper office. Inasmuch as the rental check was accompanied by the courtesy notice for the lease, employees of the Colorado State Office had actual notice not only of the proper office for receipt of the check, but also that the payment was due on or prior to August 1. It was not until August 1, however, that the payment was transmitted to the Montana State Office.
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> We recognize that the various state offices of BLM have numerous and varied tasks which require specialized attention. Nevertheless, a delay of over 2 weeks in transmitting the payment was unjustified. While it is true that but for the initial error of the appellant there would have been no opportunity for the delay occasioned in the Colorado State Office, we feel that this Board must recognize the Department's obligations to react to erroneous actions of members of the public with reasonable dispatch. It is clear that reinstatement in cases such as the one at bar will necessitate a weighing process which at times may turn on fine distinctions. But this is essentially what the Department is required to do in administering the provisions of the reinstatement law.

45 IBLA at 148.

In Margaret C. Hose, 19 IBLA 307 (1975), the lessee mailed rental checks 8 days in advance in an envelope addressed with the proper post office box and zip code for the Wyoming State Office of BLM but with "Denver, Colorado" written as the city and state of destination (rather than Cheyenne, Wyoming). The envelope was returned to the lessee on September 30, who re-mailed it the same day with a fully correct address. The payment arrived one day late, and the Wyoming State Office denied the petitions for reinstatement on the grounds that the lessee had not shown reasonable diligence. The Board reversed, however, stating:

> Upon inquiry to the United States Postal Service, Washington, D.C., we were informed that when there exists a conflict between a written address and a zip code, the zip code would take precedence as most metropolitan post offices are now equipped with machines which direct mail solely upon the basis of zip codes. In the present case, appellant's initial letter was properly zip-coded (and also had the correct addressee and post office box number). Presumably, the letter was personally handled and the zip code ignored. Under these circumstances, the Board concludes that but for the postal service's disregard of the zip code, appellant's payment would have arrived in the proper land office on or prior to the due date. Upon return of her letter, appellant promptly mailed the rental payment to Cheyenne. Therefore, we conclude that appellant has met the reasonable diligence standard despite the initial misdirection error.

19 IBLA at 310-11.

In Gulf Oil Corp., supra, and Estate of Arlyne Lansdale, 83 IBLA 190 (1984), the payments arrived in the wrong office, respectively, on the anniversary date and one day before the anniversary date. In Lansdale, the Board stated:

> As the Board noted in Gulf, limited exceptions to this principle [that mailing a rental payment to the wrong office precludes a finding of reasonable diligence] have been recognized where the payment was sent to the wrong office but the payment was received sufficiently in advance that it would have been timely received in the proper office anyway had BLM promptly acted to either forward or return the misdirected payment. Monsanto Co. v. Watt, [supra]; Richard L. Rosenthal, [supra]. We must find in this case, as the Board did in Gulf, that the exception is not applicable as the rental payment was received in the wrong office too close to the due date to allow for receipt of payment in the proper office by the anniversary date even with prompt forwarding.

Although there are some differences between the facts in this case and those in Monsanto Co., Rosenthal, and Hose, I believe the important facts correspond and bring it within the exception established by those cases. In this case, appellant mailed his check, marked "rental," well before the anniversary date of the lease; indeed, it arrived in the California State Office three weeks before that date, not two, as in Rosenthal. In this

case, appellant's mistake in sending the check to the wrong office combined with BLM's mistake in not returning it to him to prevent payment being timely made to the proper office. Given BLM's acknowledged mistake, I believe it would be both consistent with the court's decision in Monsanto Co., supra, and with the Board's decisions in Rosenthal and Hose, supra, as well as responsive to the intent of the Congress that the authority granted in section 188(c) be employed "to do equity" when payment has been misdirected, to treat appellant's filing of September 12, 1986, as a petition for reinstatement that should be granted upon payment of the required fee.

I dissent.

Will A. Irwin
Administrative Judge